

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NEW YORK

In Re:

DOWLING COLLEGE,

Debtor.

ZAIKOWSKI,

Plaintiff,

v.

DOWLING COLLEGE,

Defendant.

) 16-75545 (REG)

) 16-08178 (REG)

TRANSCRIPT OF (4) SUMMONS AND NOTICE OF PRE-TRIAL CONFERENCE;
[74] ADJ ORDER SCHEDULING INITIAL CASE MANAGEMENT CONFERENCE;
MOTION TO APPROVE AND AUTHORIZE PROCEDURES FOR THE
TURNOVER OF THE DEBTOR'S FEDERAL PERKINS LOAN
PORTFOLIO BY LAUREN CATHERINE KISS ON BEHALF OF
DOWLING COLLEGE; [347] MOTION TO APPROVE AND AUTHORIZE
PROCEDURES FOR THE TURNOVER OF THE DEBTOR'S FEDERAL
PERKINS LOAN PORTFOLIO BY LAUREN CATHERINE KISS ON BEHALF
OF DOWLING COLLEGE
BEFORE THE HONORABLE ROBERT E. GROSSMAN
UNITED STATES BANKRUPTCY JUDGE
MONDAY, AUGUST 28, 2017; 1:38 P.M.
BROOKLYN, NEW YORK

APPEARANCES:

FOR THE DEBTOR:

SEAN C. SOUTHARD, ESQ.

Klestadt Winters Jureller Southard & Stevens, LLP

200 West 41st Street, 17th Floor

New York, New York 10036

[Appearances continue on next page.]

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MARY GRECO

TypeWrite Word Processing Service

211 N. Milton Road

Saratoga Springs, New York 12866

APPEARANCES CONTINUED:

FOR THE PLAINTIFF:

RENE ROUPINIAN, ESQ.
Outten & Golden LLP
685 Third Avenue, 25th Floor
New York, New York 10017

FOR KIMBERLY POPPITI:

GLENN P. WARMUTH, ESQ.
Stim & Warmuth PC
2 Eighth Street
Farmingville, New York 11738

FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS:

RONALD J. FRIEDMAN, ESQ.
SilvermanAcampora LLP
100 Jericho Quadrangle, Suite 300
Jericho, New York 11753

FOR THE US TRUSTEE:

STAN YANG, ESQ.
Office of the United States Trustee
560 Federal Plaza
Central Islip, New York 11722

FOR CERTAIN MEMBERS OF THE DOWLING COLLEGE BOARD OF TRUSTEES:

HOWARD B. KLEINBERG, ESQ.
Meyer Suozzi English & Klein, PC
990 Stewart Avenue, Suite 300
PO Box 9194
Garden City, New York 11530

FOR THE DEPARTMENT OF EDUCATION:

JAMES H. KNAPP, ESQ.
US Attorney's Office, EDNY
610 Federal Plaza, 5th Floor
Central Islip, New York 11722

1 (Proceedings began at 1:42 p.m.)

2 THE CLERK: Matter Number 50, Zaikowski v. Dowling
3 College, and matter Number 51 and 52, Dowling College.

4 MS. ROUPINIAN: Good afternoon, Your Honor. Rene
5 Roupinian of Outten & Golden appearing on behalf of Lori
6 Zaikowski and the certified class.

7 MR. SOUTHARD: Good afternoon, Your Honor. Sean
8 Southard of Klestadt Winters Jureller Southard & Stevens on
9 behalf of the defendant, Dowling College.

10 MR. WARMUTH: Glenn Warmuth, Stim & Warmuth for
11 Kimberly Poppiti.

12 MR. FRIEDMAN: Good afternoon, Your Honor. Ronald
13 Friedman from SilvermanAcampora, counsel for the committee.

14 MR. YANG: Good afternoon, Your Honor. Stan Yang for
15 the United States Trustee.

16 MR. KNAPP: Good afternoon. James Knapp, Assistant
17 US Attorney for the Department of Education. Good afternoon,
18 Your Honor.

19 MR. KLEINBERG: Howard Kleinberg, Meyer Suozzi, for
20 the Dowling Trustees.

21 THE COURT: Okay.

22 MR. SOUTHARD: Good afternoon, Your Honor. Again for
23 the record Sean Southard on behalf of Dowling College.

24 Your Honor, we have just two matters on today's
25 calendar. One is the pretrial, adjourned pretrial associated

1 with the WARN Act litigation by plaintiff Zaikowski, and the
2 other matter is the adjourned hearing having to do with the
3 debtor's Perkins loan portfolio.

4 Your Honor, I would propose to start with the WARN
5 Act pretrial --

6 THE COURT: Why don't we start with the status?
7 We're all closed?

8 MR. SOUTHARD: I would be happy to start with the
9 status, Your Honor. Yes, we have closed. I'm pleased to
10 announce we closed successfully the Oakdale transaction. That
11 closed last week. The proceeds are sitting in the debtor in
12 possession accounts with Signature Bank. And we are discussing
13 what amounts of proceeds to potentially pay down to the secured
14 creditors associated with that Oakdale sale. There have been
15 various discussions among the creditors, the creditor's
16 committee, and ACA Financial Guarantee Corporation who
17 effectively holds the first lien on the Oakdale campus and now
18 the resulting proceeds from the sale. And in consultation with
19 the debtors, we have looked at the settlement construct that
20 the creditors reached and tried to come up with a model to
21 follow that settlement construct with various assumptions. Now
22 one of those assumptions we actually have an actual number for
23 with the Oakdale sale having concluded and believe that with
24 reasonable reserves approximately \$22 million of the roughly
25 \$26 million could be paid down to ACA.

1 THE COURT: Will that be paid with the Court's
2 approval or without?

3 MR. SOUTHARD: Well, Your Honor, I think we obviously
4 wanted to discuss that with Your Honor today and there is a
5 mechanism that exists under the dip note which would in effect
6 be a mandatory prepayment by the debtor once it receives the
7 proceeds of the collateral. That said, because of the
8 magnitude of the dollars that we're talking about and the
9 consequence to this case and its ultimate creditor recovery, we
10 certainly wanted to discuss that with Your Honor this morning.
11 And before we did that, we had discussions with the different
12 creditor constituents about the reasonableness of doing that
13 now. So I believe, and I don't want to speak for committee
14 counsel, but I believe that the committee is in agreement and
15 has been very much in the forefront of these discussions about
16 an appropriate reserve and that roughly the numbers I
17 articulated of a \$4 million reserve give or take is something
18 that they're amenable to, but I'll be happy to let them speak
19 to that.

20 THE COURT: Well, I mean people have whatever rights
21 they have. But what I'm concerned about is one, there are a
22 lot of -- you haven't resolved this WARN Act issue yet and
23 those folks and whatever they may or may not be entitled to.
24 And since no plan has been filed, I don't have any idea of what
25 the costs will be associated with liquidating, resolving,

1 whatever any claims the estate may have and that it has
2 adequate resources to commence those claims and to bring them.
3 I was a little -- I think this was probably put in a document
4 that I signed, so it's not up to me, but when I saw that the
5 deposit that had been forfeited by the first buyer was
6 distributed to the secured creditor I think the committee
7 agreed to --

8 MR. SOUTHARD: Yes, Your Honor.

9 THE COURT: -- as part of their deal. I never
10 concluded that those funds should have gone there. And I said
11 at the time, you all agreed to that and so I didn't get
12 involved in that at that point. But I was never really
13 convinced, and it doesn't matter, that they had a secured right
14 to those funds.

15 Now I know, because I've been through this once
16 before on the exact same issue in a case called Brown
17 Publishing, but again, that was part and parcel of what I
18 understand was the stipulation between the committee and the
19 secured creditors that did create for the committee, for want
20 of a better term, carve outs. So that was a business deal and
21 it was okay.

22 But I do want to be careful. I mean there's another
23 large chunk of property in this case that will cost something
24 to get from here to there. There may be, I don't know, but
25 [inaudible], there may be adversaries that need to be filed and

1 funded, and I don't want a debtor that's insolvent.

2 MR. SOUTHARD: Understood.

3 THE COURT: Now again, if this belongs to the secured
4 creditor, it belongs to them.

5 MR. SOUTHARD: Understood, Your Honor. And we have
6 thought about the same concerns that Your Honor is raising.
7 There is a DIP facility in place. The expectation is that the
8 funding will continue through the conclusion of an effective
9 date on the plan because, among other reasons, we do have
10 another sale to run and conclude.

11 THE COURT: Well, what's the secured creditor's
12 position? They've been paid down, they will have been paid
13 down from this. They have been paid down from houses. How
14 much are they actually owed?

15 MR. SOUTHARD: Well, recall, Your Honor that there
16 are two different sets of secured creditors, for lack of a
17 better phrase.

18 THE COURT: The total was about 60, right?

19 MR. SOUTHARD: Give or take, Your Honor, yes. And
20 the largest of those two pieces is about 38 million as of the
21 petition date. And that is the ACA piece or the 2006 bonds.
22 Those would be the facility that would be paid down fairly
23 dramatically with these Oakdale proceeds but they would still
24 hold a significant secured claim that would require a pay down
25 from the Brookhaven sale.

1 THE COURT: Yes, but there's 112 acres in Brookdale
2 which I have no idea what it's worth. It can be worth a lot.
3 But the remaining secured debt is 50 percent. I'm not saying
4 to whom, but in total. And it is a non-cash flow entity.

5 MR. SOUTHARD: Correct.

6 THE COURT: So the only monies that can support this
7 thing for the next year, because it'll take longer than I think
8 everybody thinks, is from whatever monies you have in the bank.

9 MR. SOUTHARD: Correct, Your Honor. We would either
10 self-fund with proceeds of the Oakdale sale or those proceeds
11 could effectively pay down the outstanding debt and then
12 additional borrowings occur. Those are the two options. And I
13 --

14 THE COURT: Borrow post petition against the other
15 property?

16 MR. SOUTHARD: Correct, Your Honor.

17 THE COURT: As long as these distant creditors will
18 be subordinate to it. You're going to have to make them
19 subordinate. I don't think the bank will put on raw land
20 junior. It may. Who knows? I just need you to think about
21 it. And my main concern is a WARN Act question.

22 MR. SOUTHARD: Yes, Your Honor.

23 THE COURT: There's a decision the Circuit just
24 issued, was it the Second Circuit on WARN Act that just issued
25 one?

1 MR. SOUTHARD: Yeah.

2 THE COURT: So people are watching WARN Act claims
3 now.

4 MR. SOUTHARD: Your Honor, I can talk a little bit
5 about where we are with the WARN Act.

6 THE COURT: Please.

7 MR. SOUTHARD: It might be appropriate at this point.
8 The parties met for a full day of mediation with the assistance
9 of Yan [Ph.] Juran [Ph.] who was appointed mediator by Your
10 Honor, and made progress that day. It was determined at the
11 close of the day that additional information would be required
12 primarily on the plaintiff's side to better assess the
13 potential extent of damages and in addition, some additional
14 information about the defenses that the debtor was inserting.
15 And since that time, there have been a lot of exchanges of
16 information primarily by the debtor to the plaintiff. And
17 we're at a point now where I think we're just about done with
18 that information exchange, the informal mediation based
19 information exchange and then could re-commence settlement
20 discussions. My hope would be that we'll know in the next say
21 30 days whether we're going to have a settlement or not or
22 whether we need to go into litigation in a more meaningful way.
23 And certainly it's the hope of the debtor, and I think I speak
24 for the plaintiff when I say the hope for the plaintiff as
25 well, to try to find a constructive resolution. And again, we

1 have made progress but we're just not there yet. So what I
2 would ask of Your Honor, subject to hearing from plaintiff's
3 counsel is that we potentially have a holding date of roughly
4 30 days where we would come back to Your Honor and report
5 either we were successful in settling the litigation and report
6 to Your Honor where we are or alternatively talk to Your Honor
7 about potentially moving forward with discovery in the true
8 sense.

9 THE COURT: And Mr. Juran is going to stay involved
10 because he originally was just --

11 MR. SOUTHARD: Yeah, Your Honor. As a technical
12 matter, the mediation order, the time to conclude that
13 mediation was August 1st. So we are beyond that. Mr. Juran has
14 stayed involved insofar as communicating with the parties where
15 are you, how are things?

16 THE COURT: I've known him for many, many years.
17 He's fine. I would have no reason, as long as you guys want to
18 continue, to continue the order.

19 MR. SOUTHARD: Yeah. I think at this point what I --
20 and again, I don't want to speak for the plaintiff, but I think
21 we are able to trade positions effectively without the
22 mediator. If we get to a logjam in the next interim period, I
23 would look to bring a mediator back in for assistance in
24 clearing such a logjam.

25 THE COURT: Does any of this require the consent of a

1 secured creditor to reach a settlement?

2 MR. SOUTHARD: Well, ultimately when we reach a
3 settlement, hopefully we reach a settlement, certainly the
4 creditors will have a say in that. Ultimately, the dollars
5 that we're talking about in terms of priority claims anyway
6 will need to be paid to bring this case out of Chapter 11
7 through a plan. And so we have kept the creditors -- the
8 debtor has kept the creditors abreast of where we are in terms
9 of status but they have yet to weigh in and get to the weeds on
10 the ultimate dollars that we're talking about.

11 THE COURT: But aren't the dollars you're trading
12 their money at this point?

13 MR. SOUTHARD: Yes, Your Honor. Effectively they
14 are. But because the creditors don't understand the merits of
15 the actual litigation, I believe it is necessary for the debtor
16 to reach a proposed resolution based on the merits and then
17 deal with the mechanics of the dollars and cents that must be
18 paid out to make a plan go effective. Again, they are not in
19 the dark in any respect but they have not been an active
20 participant in the mediation.

21 THE COURT: How do you know what your position could
22 be if it's not your money?

23 MR. SOUTHARD: Well, we know ultimately what we think
24 we're willing to pay in terms of merits. Basically, what we're
25 talking about is the strength of one major defense and we have

1 a view about the strength and the likelihood of success on
2 that. Plaintiff has a different view.

3 THE COURT: But could the secured creditors or a
4 secured creditor just say no, my bonds don't permit me to take
5 less than what I could get to settle a claim that's not against
6 me?

7 MR. SOUTHARD: They've not given any indication to
8 date that such a position would be put forth, but recall the
9 construct of the settlement, the inter-creditor settlement that
10 was reach provided that effectively unsecured creditors and the
11 secured creditors would share 50-50 the cost of priority claims
12 necessary to exit Chapter 11. So --

13 THE COURT: What does that mean?

14 MR. SOUTHARD: Meaning it --

15 THE COURT: They'd have to put up 50 percent?

16 MR. SOUTHARD: If the priority claims pool turns out
17 to be \$2 million, 1 million of that would effectively be paid
18 out of the secured creditors' otherwise take from the proceeds
19 and --

20 THE COURT: And then --

21 MR. SOUTHARD: The other million would first come
22 from the unsecured creditor proceeds.

23 THE COURT: For which somebody has to put an
24 unsecured creditor pool together.

25 MR. SOUTHARD: Correct, Your Honor. Ultimately when

1 we talk about the timing for plan confirmation and proceeding
2 with a plan and ultimately the effective date of a plan, that's
3 one factor that we take into consideration is we think we need,
4 based on our model, to close the Brookhaven sale transaction
5 before the unsecureds will have enough money --

6 THE COURT: Or for the unsecured creditors, or for
7 the committee to pursue sources of revenue that are not
8 controlled by the secured creditors.

9 MR. SOUTHARD: To the extent they exist. And then --

10 THE COURT: To the extent they exist.

11 MR. SOUTHARD: Those would be really limited at this
12 point I think to litigation recoveries which I again can let
13 committee counsel speak to, but I know that they have set a
14 potential claim against D&O Insurance and targets of that sort.
15 But I don't know where they are with that. But I think my take
16 on that, Your Honor, from a timing perspective would be
17 unlikely that they'll get to a recovery relative to that type
18 of asset, if any.

19 THE COURT: But I suspect that the, I'm just
20 guessing, that in the WARN Act case, as an example, the
21 settlement will come in two tranches. There'll be money that
22 can be paid which exists because it represents 50 percent and
23 it's sitting in the bank that's secured money and 50 percent on
24 [inaudible].

25 MR. SOUTHARD: Could be, Your Honor. There are also

1 other priority claims that will need to be dealt with for
2 purposes of confirmation. So it's not limited --

3 THE COURT: Well that's the other thing. That's why
4 I want to see somebody start putting in a plan because if this
5 case can't go through a plan, it's got to convert it. That'll
6 be --

7 MR. SOUTHARD: We think --

8 THE COURT: I'm not even sure I can convert a not for
9 profit but --

10 MR. SOUTHARD: I don't think you can legally.

11 THE COURT: I can't convert it. You can --

12 MR. SOUTHARD: Correct.

13 THE COURT: -- convert it. I can't force you to
14 convert it. Nobody can require the conversion but -- I mean
15 I'd rather not end up there.

16 MR. SOUTHARD: I share your position on that, Your
17 Honor. So I think from a big picture perspective we envision
18 in the very near future moving forward with a proposed sale
19 process for the Brookhaven campus. And in a best case scenario
20 would expect to see a closing around year end or the first
21 quarter of --

22 THE COURT: Really?

23 MR. SOUTHARD: -- of 2018. And again, an ideal
24 scenario, we would have a plan confirmation process that would
25 take place roughly in tandem with that closing on Brookhaven

1 and swiftly exit Chapter 11 thereafter. That's again the sort
2 of best laid plans.

3 THE COURT: So the town is cooperating out there?

4 MR. SOUTHARD: Your Honor, to date the town has been
5 cooperating. There's certainly been a lot of discussion with
6 the town planning. At this point we do not expect to proceed
7 further with planning before a sale disposition. The belief is
8 that we know about as much as we'll be able to know relative to
9 the future uses and that any buyer who will diligence the
10 opportunity at this point will be able to make their own
11 conclusions about that future use.

12 THE COURT: Okay.

13 MR. SOUTHARD: So we think based on again the
14 information we're getting from the different parties that have
15 been retained by the debtor, including the brokers, that it
16 would be a good time to go to market and we hope to roll out
17 with a proposed sale process that will look a lot I think like
18 the Oakdale sale process with some minor changes to some of the
19 details.

20 THE COURT: All right. It looks good.

21 MR. SOUTHARD: That's our big picture plan.

22 So in terms of then the proposed potential pay down
23 of proceeds, would Your Honor like to see that on motion on
24 notice?

25 THE COURT: Yes.

1 MR. SOUTHARD: Okay. We wanted to discuss that with
2 you today. So we will work on a motion for that in the near
3 term and present that to Your Honor. We will serve certainly
4 all the lienholders, the junior creditors, judgment holders and
5 the like and put that on before you. And we'll look at whether
6 we can -- how much of the current modeling we can share
7 publically at this point to try to help Your Honor get a better
8 perspective of the big picture.

9 THE COURT: Okay.

10 MR. SOUTHARD: So then turning back to the WARN Act,
11 Your Honor, my proposal on behalf of the defendant, I'll be
12 happy to let plaintiff speak, would be to ask for in essence a
13 30 day adjournment of that matter to come back before Your
14 Honor on that.

15 MS. ROUPINIAN: Good afternoon again, Your Honor.
16 Rene Roupinian on behalf of Lori Zaikowski and the certified
17 class. I'm in concurrence. We've had an opportunity to speak
18 before the conference today and I think a 30 day continuance
19 makes sense. We had a very productive first day of mediation
20 but we needed to really get our arms around the WARN damages
21 because in this particular case we have so many different
22 categories of employees. We have the full time and the part
23 time and the adjuncts and the instructors and so forth and so
24 on, and they had different agreements in terms of their
25 compensation and benefits and so forth. So it's been a process

1 that I think has been very productive and they've been terrific
2 on the other side producing what they can. We recognize that
3 the focus needed to be on the sale of the property and bringing
4 money into the estate, so we've been patient. But we have been
5 moving forward and Yan Juran has been helpful in that process.
6 His efforts do not come at a discount so we think it does make
7 sense to do as much as we can between the parties and bring in
8 Mr. Juran when we need him if we hit any sort of roadblocks
9 when we get to the point where we can actually start talking
10 about numbers and allocating risk based on the defenses and so
11 forth.

12 So we would propose as well that the Court set a
13 further status conference 30 days out.

14 THE COURT: When's the next [inaudible]? When are
15 you going to put this on -- you're going to have the motion
16 returnable sooner than you want this I assume.

17 MR. SOUTHARD: I'm sure that the creditors would like
18 that, Your Honor. We --

19 THE COURT: They're not going anyplace.

20 MR. SOUTHARD: We probably -- we could probably have
21 our motion on file in a week and really subject to Your Honor's
22 calendar. I would think we would need 14 days notice at a
23 minimum for that following the local rules --

24 THE COURT: It's not going to be the beginning of
25 October, so it has to be towards October 23rd, around there?

1 That would be the date.

2 MR. SOUTHARD: October 23rd?

3 THE COURT: 23rd.

4 MR. SOUTHARD: I think we have a --

5 THE COURT: Yes, October 28th. No --

6 MR. SOUTHARD: We're going in that direction.

7 THE COURT: You're going in the wrong direction. The
8 problem is that NCBJ is the beginning of October and so my
9 exalted position and I have to go to that thing. And that
10 takes me to the 15th of October. Before that we have trials,
11 trial dates, so no, that's probably the best you're going to
12 get. You're not going to do it in September. September is too
13 soon I guess.

14 MR. SOUTHARD: What do we have in September?

15 MALE SPEAKER: I think the very --

16 MALE SPEAKER: September 30 as a benchmark day if we
17 can. Any time before that.

18 THE COURT: Why?

19 MALE SPEAKER: It will save us some money on the
20 [inaudible] distribution [inaudible].

21 THE COURT: I'll accept that. I don't know what
22 you're talking about but I'll accept that. What?

23 THE CLERK: [Inaudible].

24 THE COURT: 25th or 27th. Would that be enough time to
25 get anything out of the WARN Act question. You guys put the

1 motion up but --

2 MR. SOUTHARD: No, the motion will be no problem.

3 THE COURT: That I know you can do.

4 MR. SOUTHARD: The 27th, Your Honor.

5 THE COURT: Okay. Mr. Kleinberg, the 27th work?

6 MR. KLEINBERG: Excellent, Your Honor. Thank you so
7 much.

8 THE COURT: We aim to please.

9 THE CLERK: At 1:30?

10 THE COURT: 1:30. Okay. Good luck.

11 MS. ROUPINIAN: Thank you. And in terms of NCBJ,
12 I'll be speaking on the judgment panel, so hope to see you
13 there.

14 THE COURT: That's why she can get what she wants.
15 Friends of NCBJ are reporting to me these days.

16 MS. ROUPINIAN: Thank you.

17 MR. SOUTHARD: Your Honor, I intend to register for
18 the NCBJ immediately after this hearing.

19 MALE SPEAKER: I do too.

20 THE COURT: We actually put -- the moderator put some
21 fliers in.

22 MR. SOUTHARD: It's right here.

23 THE COURT: Are they there too? And there's a group
24 of lawyers in this courthouse I don't think can spell NCBJ
25 spotting them two of the initials. They're all going. Not

1 because of me, because it's in Vegas. So to some people, they
2 won't show up because it's in Las Vegas, and others want to go.
3 And I just can't imagine the headline, one of our senators
4 getting in touch with the National Conference of Bankruptcy
5 Judges holding its convention in Las Vegas. I always wondered
6 who decided that was a good idea. It's like the Mohican Sun
7 thing that we do every couple of years. Go through the casino
8 for it.

9 All right. So that's set. What else do we have on
10 today?

11 MR. SOUTHARD: So the only other item we have on,
12 Your Honor, is the debtor's adjourn motion having to do with
13 this Perkins loan portfolio and the debtor's proposed turnover
14 of that loan portfolio. This is docket number 347 that the
15 debtor filed back on June 16th and Your Honor initially heard in
16 July. And we discussed during that July hearing the question
17 of whether there was and is a property of the estate interest
18 in that loan portfolio that the debtor was proposing to assign.
19 And since that point, Your Honor, the debtor and counsel to the
20 US Department of Education, the US Attorney's Office have had a
21 couple of different conversations trying to find a potential
22 resolution that would recognize the potential for that property
23 and the estate interest. And I believe as of the end of the
24 week basically Education was at a point where they felt from
25 their perspective under their rules and regulations they were

1 unable to effectively give consideration to the bankruptcy
2 estate for Dowling's potential interest in the loan portfolio.
3 And so on Friday early evening a brief was filed explaining
4 their position which I will confess I have not had a full
5 opportunity to review myself because I was away. But I think
6 it's possible that other parties might have views to express --

7 THE COURT: Anybody read it?

8 MR. SOUTHARD: -- in response to that.

9 THE COURT: I mean I did. You read it?

10 MALE SPEAKER: I read it.

11 THE COURT: This is like class. The guy in the back
12 actually read the assignment.

13 MR. SOUTHARD: So I generally understand because we
14 did have a discussion about their position.

15 THE COURT: You can spend an hour arguing if you'd
16 like. I'm going to leave, but you can spend an hour arguing.
17 The answer is -- did you see that show with that old guy, I
18 used to call him old guy, the new show, and the answer is, only
19 because he got to talk. You're partially right and you're
20 partially wrong. Certain of these dollars I would find are
21 property of the estate. The single most interesting line is
22 it's 76 percent give or take of these people aren't going to
23 pay these loans back anyway and their total interest is
24 300,000. So if I take 20 percent of 300,000 or \$60,000 give or
25 take, that the estate doesn't want to spend litigating with

1 you, the results here is probably I'm not going to give you an
2 order saying this is not property of the estate. I'm going to
3 go with door number two unless anybody objects that the debtor
4 will abandon its interest and leave for another day the
5 question of whether you're right or wrong with regards to
6 property of the estate. So if you can live with that, that's
7 the answer. I mean I can order it anyway. If you can't, then
8 I'm not going to give you anything and we're going to litigate
9 it.

10 MR. SOUTHARD: Your Honor --

11 MR. KNAPP: This doesn't sound like the piece of cake
12 from the previous case.

13 THE COURT: What?

14 MR. KNAPP: It doesn't sound like the piece of cake
15 you had in the prior case.

16 MR. SOUTHARD: Your Honor, the one thought that we on
17 the debtor's side had after this development last week is that
18 perhaps, because there is a desire to assign the loan portfolio
19 as a mechanic that perhaps we could do what Your Honor is
20 suggesting, leave open the question of the amount of the value
21 of the debtor's interest in that loan portfolio.

22 THE COURT: But I think the Government's position is
23 it doesn't matter because once you go off the program, whatever
24 you put in, even if it's yours now becomes theirs, is that
25 correct?

1 MR. KNAPP: Yes.

2 MR. SOUTHARD: That is their position, Your Honor,
3 yes.

4 THE COURT: So whatever -- figuring out the number is
5 irrelevant. It's the legal concept. And I don't know if
6 you're right or wrong. I mean it's a technical fight. And I
7 think the papers were good and somebody would have to respond
8 but you're going to be responding over if you're right and
9 their numbers are right, a rather small amount of money because
10 I think the original numbers you had 20 some odd million
11 dollars in this program but you're down to a million seven? A
12 million seven --

13 MR. SOUTHARD: Yes.

14 THE COURT: -- of which somebody calculated 330 some
15 odd thousand dollars is your interest. Their position is
16 whatever you would get of that, and it doesn't matter because
17 somehow you have a contractual obligation that once you leave
18 the program whatever you put in, even if attributable to you,
19 goes to them. Now, I'm not sure they'd win that in a
20 bankruptcy court. They may. I'm not sure whether it's been
21 litigated yet. It's a question of whether you want to on a
22 practical basis you want to use the money to do it.

23 MR. SOUTHARD: Yeah, we don't think it has been
24 litigated, Your Honor, which is why we originally filed the
25 motion the way we did. And I think in part we're saying the

1 same thing whether it's abandonment or assignment of the loan
2 portfolio.

3 THE COURT: But are you going to transfer the money
4 to them? Or you're going to hold the money?

5 MR. SOUTHARD: No, Your Honor. We would transfer the
6 loan portfolio, the loans themselves, for administration by the
7 Government --

8 THE COURT: I'll do that.

9 MR. SOUTHARD: -- and then hold the money subject to
10 a further order of Your Honor's when we've completed the
11 accounting that will be necessary associated with that. And we
12 would leave open the question of property of the estate.

13 THE COURT: So they would get about a million four
14 give or take?

15 MR. SOUTHARD: They would actually get loans that
16 have --

17 THE COURT: Or whatever that package is.

18 MR. SOUTHARD: -- that have certain principal amounts
19 outstanding and they would then take over as the administrator
20 of those loans. The debtor would no longer --

21 THE COURT: And then remit to you your piece if the
22 Court determined that?

23 MR. SOUTHARD: No, Your Honor. I think they would --
24 those loans would pass back into the program as their rules
25 contemplate.

1 THE COURT: Right.

2 MR. SOUTHARD: We have, however, about \$400,000 give
3 or take in DIP accounts that is potentially tied to that loan
4 program because the proceeds of the Perkins loan program . And
5 instead of transferring that money now, we would do so based on
6 a further order from Your Honor after the accounting is
7 completed and --

8 THE COURT: So you're not abandoning. You're
9 basically arguing that they have the right -- you'll transfer
10 to them the management of the portfolio. The debtor wishes to
11 maintain its interest to whatever extent in the cash and
12 litigate that issue with the Government.

13 MR. SOUTHARD: Yes.

14 THE COURT: Or settle title.

15 MR. SOUTHARD: Yes. And the extent to which there
16 were any hypothetical interests in the loan portfolio, we can
17 preserve that issue for a later date.

18 THE COURT: What do you say, sir?

19 MR. KNAPP: I really don't have anything to add other
20 than in the papers, Your Honor. Education's position though is
21 it's an all or nothing proposition. If we're talking about, as
22 I think I understood Your Honor a moment ago, that Education
23 would administer the loans going forward but there would be
24 some carve out of the repayments --

25 THE COURT: That's wrong. I misunderstood that.

1 What they're saying is the bulk of these loans go to you.

2 MR. KNAPP: Well, all of the -- the portfolio of
3 loans that has at least on paper a value of about \$1.8 million
4 would be transferred back to Education.

5 MR. SOUTHARD: Would be assigned, right, under their
6 rules.

7 THE COURT: But there's cash in a bank.

8 MR. KNAPP: Yes.

9 THE COURT: That cash they're not prepared to agree
10 to transfer to you.

11 MR. KNAPP: I understand.

12 THE COURT: Your position is you own it.

13 MR. KNAPP: Correct.

14 THE COURT: And that would be the issue to litigate.
15 Do you own it or does the estate own it?

16 MR. KNAPP: Or as Your Honor articulated some weeks
17 ago, is there a percentage of ownership between the Department
18 of Education --

19 THE COURT: Right. I mean again, what is there --
20 all I care about is what is property of the estate. It is in
21 the debtor's possession now. Your argument is that when they
22 terminated the participation in the program by filing the
23 bankruptcy under your rules it doesn't matter whether they
24 would own it or you would own it. It all goes back to the
25 government. That was the deal they made to participate in the

1 process.

2 MR. KNAPP: And it predates the bankruptcy filing.

3 THE COURT: Yes.

4 MR. KNAPP: When Dowling enrolled in, for lack of a
5 better word, the Perkins program 50 odd years ago, the
6 agreement of their seed money was that this money would be used
7 only for the Perkins loan program.

8 THE COURT: Right.

9 MR. KNAPP: They didn't have rights to it before they
10 got to bankruptcy other than for use --

11 THE COURT: You may be right.

12 MR. KNAPP: -- in the Perkins loan program. And then
13 when they closed their doors in June I believe of '16 the
14 bankruptcy case was filed in November of '16, they were
15 obligated at that point to send everything related to the
16 Perkins loan program back to the Department of Education.

17 THE COURT: The only issue is whether the intervening
18 bankruptcy alters the rights of the parties as it does in
19 countless ways. It may or may not. I don't know the answer to
20 that. They haven't put in any papers. So I think I would
21 agree today that you guys can enter an order saying that you
22 can get the portfolio and we leave this to a second fight. You
23 have put in papers already. They would respond. And we see if
24 we can short circuit and get a hearing on it and finish it. I
25 think it's better for you to get the portfolio today because I

1 think it should be serviced.

2 MR. SOUTHARD: From the debtor --

3 THE COURT: So this is without prejudice to your
4 rights arguing it all belongs to you.

5 MR. SOUTHARD: From the debtor's perspective, I think
6 that makes sense, Your Honor.

7 THE COURT: I'll do that.

8 MR. SOUTHARD: We'll try to work on a form of order
9 that is agreeable between the parties and we'll include the
10 committee.

11 THE COURT: It has to be without prejudice to the
12 Government's right to argue that just because it entered into,
13 recognizes, whatever it is, that does not affect their right to
14 argue it's all theirs, nor does it affect your right to argue
15 that it's property of the estate and should be divided in a
16 certain fashion.

17 MR. SOUTHARD: Understood, Your Honor.

18 THE COURT: That would resolve at least that for
19 today. And then you'll put in papers and we'll get a hearing
20 date. So what's on today, I think we resolved this motion.
21 No, I'll carry this motion. Just put in an interim order on
22 this and we'll use this motion to resolve the rest of it.

23 MR. SOUTHARD: Very well, Your Honor. And should we
24 assume this is carried to September 27th as well?

25 THE COURT: Yes. I'm not sure we'll have anything

1 that day because you guys got to put papers and they may want
2 to respond. But we'll use that as a holding date.

3 MR. SOUTHARD: Thank you, Your Honor.

4 THE COURT: All right?

5 MR. SOUTHARD: That concludes everything we had on
6 the calendar this afternoon.

7 THE COURT: Well, I don't have anything. Anybody
8 else want to talk about anything? Golf match, Yankee game,
9 anything? All right. Thanks, folks.

10 MR. SOUTHARD: Thank you, Your Honor.

11 THE COURT: Court's adjourned.

12 (Proceedings concluded at 2:21 p.m.)

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 *Mary Greco*

6 _____
7 Mary Greco

8 Dated: September 5, 2017
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